IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DENNIS BOST,

Plaintiff,

vs. **CIVIL ACTION**
No. 02-2182-GTV

HEADCO INDUSTRIES, INC.,

Defendant.

MEMORANDUM AND ORDER

In July 2001, Defendant Headco Industries, Inc. laid off Plaintiff Dennis Bost as part of a reduction in force ("RIF"). At the time, Plaintiff suffered from chemical depression and was over the age of forty. Plaintiff now brings suit alleging that Defendant discriminated against him because of his perceived disability, violating the Americans with Disabilities Act ("ADA"), 42 U.S.C. § 12101 et seq. He further alleges that Defendant discriminated against him because of his age, violating the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. § 621 et seq. The case is before the court on Defendant's motion for summary judgment (Doc. 39).[1] For the reasons stated below, the court grants Defendant's motion in part and denies it in part. Plaintiff's ADA

[1] The court notes that the motion for summary judgment was ripe on June 30, 2003. On July 8, 2003, Plaintiff filed a motion for leave to file a surreply. The court granted the motion, gave Plaintiff until July 25 to file a surreply, and moved the trial from August 5, 2003 to September 23, 2003. Plaintiff inexplicably failed to file a surreply. The court renders this decision based on the briefs and evidence before it, but notes that the evidence objected to by Plaintiff in his motion for leave to file a surreply is largely immaterial to the disposition of the motion for summary judgment.

claim is dismissed, but his ADEA claim remains in the case.

I. FACTUAL BACKGROUND

The following facts are taken from the summary judgment record and are either uncontroverted or viewed in the light most favorable to Plaintiff's case. Immaterial facts and facts not properly supported by the record are omitted.

Defendant distributes gears, bearings, and power transmissions to various manufacturers, including steel manufacturers. Defendant is structured into four "Profit Centers." Each Profit Center is run by a Group Vice-President. Each Group Vice-President makes the final decisions about issues in his or her respective Profit Center, with suggestions and input from Jim Timble, Defendant's President. Mr. Timble ultimately approves all personnel changes by initialing the forms.

In August 1995, Tom Highley, Group Vice-President of Profit Center III, hired Plaintiff as a rubber products specialist, also known as a rubber hose specialist and/or a hydraulic hose specialist. Plaintiff was hired to establish and run the Hose Shop in Kansas City and to service a new line of business from GST Steel. Plaintiff was over age forty at the time. Mr. Highley was replaced in January-March 2001 by Robert Sullivan, who was also over age forty.

Around 1995, Plaintiff was diagnosed with chemical depression. Once he began medication, his symptoms were alleviated. In 1997, Plaintiff told Mr. Highley about his depression. Plaintiff told Mr. Sullivan about his depression in April or May of 2001.

During his employment, Plaintiff regularly worked long hours and rarely missed work. He testified in deposition that even when he had bouts of depression, he still reported to work. Both

Mr. Highley and Mr. Sullivan testified in deposition that Plaintiff was a good performer, in fact "one of the best if not the best."

In February 2001, GST Steel, one of Defendant's major clients in the hose and rubber products area, declared bankruptcy and closed. Defendant struggled financially and eliminated several positions during 2001. Between January 2001 and May 2002, Defendant laid off or failed to replace 162 employees, both under and over the age of forty. In Plaintiff's Profit Center, Mr. Sullivan eliminated a total of sixteen positions between January and November 2001, affecting employees both under and over age forty.

As early as February 2001, Mr. Sullivan discussed with Mr. Timble the possibility of eliminating the specialist positions company-wide, including Plaintiff's position. They discussed eliminating the hose/hydraulic specialist positions again in May, June, and July 2001. In approximately May 2001, Mr. Timble told Mr. Sullivan that the company needed to eliminate the hose and mechanical drive product specialist positions. On or about July 16, 2001, Mr. Timble sent each Group Vice-President a memo indicating that costs had to be cut. A week prior to issuing the memo, Mr. Timble spoke with each Group Vice-President, including Mr. Sullivan, about the content of the memo. Mr. Timble testified in deposition, "The week before this memo, I called each Group Vice-President, told them the memo was coming, and I said, please take notice of the one sentence in the memo. Please don't wait for me to come to you. And I told them that week that I expected to see the specialists be – the three hose specialists and the mechanical specialist be in their – in this new round of cuts."

On or about July 18-19, 2001, Mr. Sullivan made the decision to terminate Plaintiff's

employment. At the time, there were no available sales territories in Plaintiff's Profit Center to which Plaintiff could have been transferred. Mr. Sullivan told Plaintiff on July 23, 2001 that there was a strong possibility his job would be eliminated. Mr. Sullivan gave Plaintiff the news about his job at the end of a conversation where Plaintiff admitted that he had been hospitalized the previous week for his depression.

On Monday of the previous week (July 16, 2001), Plaintiff had called the office to take the week off as vacation. He did not indicate that he was taking the week off for illness. On Tuesday, July 17, 2001, Plaintiff began fighting with his wife, Lynn Bost. Mrs. Bost would not let him leave the house, and in response, Plaintiff took a gun into the bathtub and threatened to kill himself. He testified in deposition that he did not really intend to kill himself; he simply wanted to scare his wife. Plaintiff discharged the gun into the bathtub and left the house. While he was gone, Mrs. Bost obtained a restraining order against him. When Plaintiff returned the next day, he was arrested and taken to the University of Kansas Medical Center. He was admitted to a hospital for group counseling and was discharged on Friday, July 20, 2001.

Mrs. Bost worked as an executive assistant for Mr. Highley. During the week of July 16-20, Mr. Sullivan spoke with Mrs. Bost twice by phone. Mrs. Bost told Mr. Sullivan that Plaintiff had fired a gun into the bathtub, that she had filed a police report, and that Plaintiff had been hospitalized.

Mrs. Bost testified in deposition that when she worked for Mr. Highley, she had numerous conversations with him about Plaintiff's depression. She also testified that she had virtually the same conversations with Mr. Sullivan and that Mr. Sullivan held the same views as Mr. Highley.

According to Mrs. Bost, Mr. Highley explained to her that "people with serious health problems were more of a liability to the company than . . . other companies" because Defendant was self-insured. Mrs. Bost testified that she pointed out to Mr. Highley that Plaintiff was someone who was protected under the ADA because of his depression. Mr. Highley asked her to research the ADA "as it applied to each one of the employees in question with health problems, as to how we would go about forcing them into retirement or letting them go altogether. . . ." Mr. Highley told Mrs. Bost that "since [Defendant] was a self-insured company as far as health insurance, and since layoffs needed to occur, that it seemed financially expedious to let go, if somebody had to be let go, that it should be someone with a serious health problem that could be a huge liability for the company." Finally, Mrs. Bost testified that Mr. Sullivan intimated to her that his mother had been diagnosed as bipolar, but that he considered bipolar disorder as "just one more excuse for her dumb behavior."

When Plaintiff was laid off, two younger employees were not. Mike Ferguson, age 27, was a hydraulic specialist in Profit Center I in July 2001. Jim Scardina, Group Vice-President for Profit Center I, transferred Mr. Ferguson to an outside sales position in Wood Dale, Illinois, where Mr. Ferguson had previously worked. Phil Youst, age 39, was a hydraulic specialist in Profit Center V. John Timble, the brother of Jim Timble, transferred Mr. Youst to an outside sales position in Profit Center V, where Mr. Youst had previous experience. Mr. Sullivan had no role in either of these decisions.

II. SUMMARY JUDGMENT STANDARD

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Lack of a genuine issue of material fact means that the evidence is such that no reasonable jury could return a verdict for the nonmoving party. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Essentially, the inquiry is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." Id. at 251-52.

The moving party bears the initial burden of demonstrating the absence of a genuine issue of material fact. This burden may be met by showing that there is a lack of evidence to support the nonmoving party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 325 (1986). Once the moving party has properly supported its motion for summary judgment, the burden shifts to the nonmoving party to show that there is a genuine issue of material fact left for trial. Anderson, 477 U.S. at 256. "[A] party opposing a properly supported motion for summary judgment may not rest on mere allegations or denials of his pleading, but must set forth specific facts showing that there is a genuine issue for trial." Id. Therefore, the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment. Id. The court must consider the record in the light most favorable to the nonmoving party. Bee v. Greaves, 744 F.2d 1387, 1396 (10th Cir. 1984).

III. DISCUSSION

A. Disability Discrimination

Plaintiff first claims that Defendant terminated his employment because Defendant regarded him as disabled. The ADA prohibits employers from discriminating "against a qualified individual with a disability because of the disability of such individual in regard to . . . discharge of employees . . . ." 42 U.S.C. § 12112(a). Where, as here, there is no direct evidence of discrimination, the court applies the three-step, burden-shifting analysis set forth by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Morgan v. Hilti, Inc., 108 F.3d 1319, 1323 (10th Cir. 1997) (citation omitted) (applying McDonnell Douglas analysis to ADA discrimination claim). Under the McDonnell Douglas test, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. 411 U.S. at 802. If the plaintiff presents a prima facie case, then the burden shifts to the defendant to offer evidence suggesting a legitimate, non-discriminatory reason for the adverse employment action taken against the plaintiff. Id. Once the defendant articulates a legitimate, non-discriminatory reason, the ultimate burden reverts to the plaintiff to demonstrate an issue of material fact as to whether the proffered reason is pretextual. St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 507-08 (1993) (citation omitted); Randle v. City of Aurora, 69 F.3d 441, 451 (10th Cir. 1995). Pretext can be established if the plaintiff shows either "that a discriminatory reason more likely motivated the employer or . . . that the employer's proffered explanation is unworthy of credence." Tex. Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 256 (1981) (citation omitted); Rea v. Martin Marietta Corp., 29 F.3d 1450, 1455 (10th Cir. 1994) (citation omitted). "[A] plaintiff's prima facie case, combined

with sufficient evidence to find that the employer's asserted justification is false, may permit the trier of fact to conclude that the employer unlawfully discriminated." Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 148 (2000).

To establish a prima facie case of discrimination under the ADA, a plaintiff must show: (1) he has a "disability" within the meaning of the ADA; (2) he was qualified, with or without reasonable accommodation, to perform the essential functions of his job; and (3) his employer terminated his employment under circumstances that give rise to an inference that the decision was based on his disability. Morgan, 108 F.3d at 1323 (citation omitted). Defendant contends that Plaintiff has failed to offer evidence establishing that he has a "disability."

A person is considered to have a "disability" under the ADA if he: (1) has a physical or mental impairment that substantially limits one or more of his major life activities; (2) has a record of such impairment; or (3) is regarded by the employer as having such an impairment. Tate v. Farmland Indus., Inc., 268 F.3d 989, 992 (10th Cir. 2001) (quoting 42 U.S.C. § 12102(2)). Plaintiff claims that he qualifies as "disabled" because Defendant regarded him as having an impairment that substantially limited a major life activity. Although Plaintiff originally claimed that he had an actual disability and/or a record of disability, he has since abandoned those claims.

With the "regarded as" provision, Congress sought to protect those discriminated against based on "myths, fears and stereotypes." 29 C.F.R. pt. 1630, App. § 1630.2(*l*); see also Sch. Bd. of Nassau County v. Arline, 480 U.S. 273, 284 (1987). A person is regarded as disabled if either of the following requirements is met:

(1) a covered entity mistakenly believes that a person has a physical impairment that

> substantially limits one or more major life activities, or (2) a covered entity mistakenly believes that an actual, nonlimiting impairment substantially limits one or more major life activities. In both cases, it is necessary that a covered entity entertain misperceptions about the individual – it must believe either that one has a substantially limiting impairment that one does not have or that one has a substantially limiting impairment when, in fact, the impairment is not so limiting.

Sutton v. United Air Lines, Inc., 527 U.S. 471, 489 (1999). An employer is, however, "free to decide that some limiting, but not *substantially* limiting, impairments make individuals less than ideally suited for a job." Id. at 490-91. Thus, Plaintiff can only survive summary judgment if he presents triable evidence that Defendant regarded him as substantially limited in one or more of his claimed major life activities. Rakity v. Dillon Cos., Inc., 302 F.3d 1152, 1162 (10th Cir. 2002).

In his brief, Plaintiff does not specify in which major life activities Defendant regarded him as being substantially limited. In the pretrial order, Plaintiff claimed that his chemical depression limits his major life activities of thinking, concentrating, interacting with others, and working. The court assumes Plaintiff claims that Defendant regarded him as being substantially limited in these areas.

Defendant does not challenge whether Plaintiff's depression constitutes an impairment, and assumes without conceding that the activities of thinking, interacting with others, and working constitute "major life activities." Defendant notes, and the court agrees, that "concentrating" is not a major life activity. Pack v. Kmart Corp., 166 F.3d 1300, 1305 (10th Cir. 1999) ("Concentration may be a significant and necessary component of a major life activity, such as working, learning, or speaking, but it is not an 'activity' itself."). The Tenth Circuit has recognized

"working" as a major life activity, Siemon v. AT&T Corp., 117 F.3d 1173, 1176 (10th Cir. 1997); but see Sutton, 527 U.S. at 492 ("We note, however, that there may be some conceptual difficulty in defining 'major life activities' to include work. . . ."), but has declined to address whether "thinking" or "interacting with others" is a major life activity, Steele v. Thiokol Corp., 241 F.3d 1248, 1254 (10th Cir. 2001) (noting split on "interacting with others"); Doyal v. Okla. Heart, Inc., 213 F.3d 492, 496 (10th Cir. 2000) (assuming both "thinking" and "interacting with others" are major life activities). Because Defendant does not challenge whether any of Plaintiff's identified activities are major life activities, the court proceeds to the inquiry of whether Defendant regarded Plaintiff's depression as substantially limiting any of these activities.

Defendant concedes that it was aware of Plaintiff's depression. But mere knowledge of Plaintiff's impairment is insufficient to establish that Defendant regarded Plaintiff as disabled. The Tenth Circuit has held that an employer's knowledge of an employee's disability/medication and a supervisor's concern about the employee's mood swings were insufficient to create a triable issue as to whether the employer regarded the employee as disabled. Steele, 241 F.3d at 1256; see also 29 C.F.R. § 1630.2(*l*)(1), (3) ("[A]n employer's request for a mental evaluation . . . is not equivalent to treatment of the employee as though she were substantially impaired."). Judge Lungstrum of this court has noted the difficulty with holding otherwise: "[E]mployers would be discouraged from attempting to work with people who, though not actually disabled, feel themselves in need of some special treatment from their employer to help them obtain or keep their jobs." Gaddy v. Four B Corp., 953 F. Supp. 331, 338 (D. Kan. 1997); see also Gazaway v. Makita U.S.A., Inc., 11 F. Supp. 2d 1281, 1288 (D. Kan. 1998) (holding that the fact that the

employer encouraged an employee to seek counseling established only that the employer was sympathetic to the employee's experience, not that the employer regarded the employee as disabled).

The record is devoid of any evidence indicating that Defendant perceived Plaintiff as unable to think, interact with others, or work in "either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills, and abilities." 29 C.F.R. § 1630.2(j)(3). Plaintiff skims over this lack of evidence and urges the court to base its decision solely on the principles set forth by the Tenth Circuit in McKenzie v. Davala:

> According to the EEOC's interpretive guidelines, if an individual can show that a potential employer refused to hire her based on "myth, fear, or stereotype," including concerns regarding safety, insurance, liability, and acceptance by coworkers and the public, the individual will satisfy the "regarded as" prong of the definition of disability, 29 C.F.R. pt. 1630 app. § 1630.2(*l*). [The plaintiff's supervisors] admitted that their concerns included safety, liability, and public acceptance. The fact that defendant rejected [the plaintiff's] application without submitting her for a standard psychological or psychiatric assessment as provided for by state law is further evidence that those concerns were based on "myths, fears, and stereotype" rather than on an individualized assessment of her qualifications.

242 F.3d 967, 971 (10th Cir. 2001). Plaintiff asserts that Mr. Highley's and Mr. Sullivan's comments about the high costs of employees with health problems reflect Defendant's misperception, and suggest that Mr. Sullivan laid off Plaintiff based on "myth, fear, or stereotype." Plaintiff also rests his case on Mr. Sullivan's comment that his mother's bipolar disorder was "just one more excuse for her dumb behavior." Although the comments demonstrate apprehension on the part of Mr. Sullivan about the high costs of health care, they do not rise to the level of raising a genuine issue as to whether he regarded Plaintiff as being substantially limited in any major life

activity.

In McKenzie, the Tenth Circuit had before it ample evidence suggesting that the defendant considered the plaintiff unable to perform any work in the law enforcement field. Id. at 971-72. The plaintiff in McKenzie was a former deputy sheriff who left her job to seek psychological care. Id. at 968. After the plaintiff's resignation, the Undersheriff requested that her peace officer certification be revoked because he "didn't feel that [she] should be a law enforcement officer any longer." Id. at 969. The Sheriff's staff rejected the plaintiff's request to reapply for a Sheriff's office position – "any job in the department" – because they thought that she "would be better off in some other field." Id. at 968, 972. The court's decision is distinguishable from the instant case, where the employer's perception relates to its concern about the cost of health care for employees with health problems, rather than a perception that the employee is unable to engage in the major life activity of working.

Here, Mrs. Bost only testified specifically about conversations she had with Mr. Highley, who was not a decisionmaker, and his views may not be relevant in this case. While Mrs. Bost testified that Mr. Sullivan held the same views as Mr. Highley, Plaintiff has failed to explain how views about the high costs of employees with health problems translate into evidence that Mr. Sullivan regarded Plaintiff as disabled. Finally, Mr. Sullivan's comment about his mother does not establish that he regarded Plaintiff as disabled. The comment suggests to the court a possible misperception that mental disorders are *not* disabling – not a view that someone with depression is unable to engage in certain major life activities.

In sum, the court concludes that Plaintiff has failed to present sufficient evidence

suggesting that Defendant regarded him as disabled. Absent such a showing, Plaintiff is unable to establish a prima facie case, and the court must grant summary judgment. The court need not address the remainder of the McDonnell-Douglas burden-shifting framework with respect to Plaintiff's ADA claim.

B. Age Discrimination

Plaintiff next claims that Defendant discriminated against him because of his age. The same McDonnell Douglas standard that applies to Plaintiff's ADA claim applies to his age discrimination claim. Munoz v. St. Mary-Corwin Hosp., 221 F.3d 1160, 1165 (10th Cir. 2000) (citations omitted). In a reduction in force ("RIF") case, the plaintiff's burden is as follows:

> To make out a prima facie case of discriminatory discharge under the ADEA, a claimant affected by a RIF must prove: (1) that she is within the protected age group; (2) that she was doing satisfactory work; (3) that she was discharged despite the adequacy of her work; and (4) that there is some evidence the employer intended to discriminate against her in reaching its RIF decision. See Ingels v. Thiokol Corp., 42 F.3d 616, 621 (10th Cir. 1994). The fourth element may be established "through circumstantial evidence that the plaintiff was treated less favorably than younger employees during the reduction in force."

Beaird v. Seagate Tech., Inc., 145 F.3d 1159, 1165 (10th Cir. 1998); Stone v. Autoliv ASP, Inc., 210 F.3d 1132, 1137 (10th Cir. 2000). The Tenth Circuit has explained that in a RIF case, "a plaintiff who is fired pursuant to a RIF and who held a similar position to a younger retained employee can satisfy the fourth element." Beaird, 145 F.3d at 1167; Branson v. Price River Coal Co., 853 F.2d 768, 771 (10th Cir. 1988) ("Evidence that an employer fired qualified older employees but retained younger ones in similar positions is sufficient to create a rebuttable presumption of discriminatory intent and to require the employer to articulate reasons for its

decision."). Even though the employer may explain its decision by the exigencies of a RIF, "these exigencies are best analyzed at the stage where the employer puts on evidence of a nondiscriminatory reason for the discharge." Id. "[T]he burden imposed on a plaintiff at the prima facie stage is 'not onerous.'" EEOC v. Horizon/CMS Healthcare Corp., 220 F.3d 1184, 1197 (10th Cir. 2000) (quoting Burdine, 450 U.S. at 253). In Beaird v. Seagate Technology, Inc., the Tenth Circuit held that where at least one younger and/or nonminority employee was retained in the same job code, the plaintiffs met their burden of proof. 145 F.3d at 1168.

Plaintiff claims that he has fulfilled his prima facie case burden because Mike Ferguson and Phil Youst, two younger employees performing the same job Plaintiff performed, were retained after July 31, 2001. Defendant counters that "similar positions" require the same supervisor. Defendant claims that because Mr. Sullivan made the decision to terminate Plaintiff's employment, and other supervisors made the decisions to retain Mr. Ferguson and Mr. Youst, Plaintiff cannot establish his prima facie case.

The court has been unable to find Tenth Circuit law directly addressing whether a "similar position" requires the same supervisor. All of the cases Defendant cites involve the "similarly situated" pretext analysis, not the "similar position" prima facie case analysis. See, e.g., Aramburu v. Boeing Co., 112 F.3d 1398, 1404 (10th Cir. 1997) (citations omitted); Trujillo v. Sanchez, 1996 WL 32138, at *2 (10th Cir. Jan. 29, 1996). Because of the clear Tenth Circuit directive that the prima facie case burden is not an onerous one, Horizon/CMS Healthcare Corp., 220 F.3d at 1197 (quoting Burdine, 450 U.S. at 253), the court declines to require Plaintiff to show that the same supervisor made the RIF decision at the prima facie case stage.

Plaintiff concedes that Defendant has asserted a facially non-discriminatory reason for its actions, the RIF. The burden thus returns to Plaintiff to show evidence of pretext. To establish pretext, Plaintiff must show that Defendant's explanation for its actions is unworthy of credence or that Defendant was motivated by a discriminatory reason in its actions. Rea, 29 F.3d at 1455 (citation omitted). Plaintiff need not demonstrate unequivocally that Defendant's explanation was false. Id. (citation omitted). It is also unnecessary to show that "age was the sole motivating factor in the employment decision." EEOC v. Prudential Fed. Sav. & Loan Ass'n, 763 F.2d 1166, 1170 (10th Cir. 1985). However, Plaintiff must make some showing "that age actually played a role in the defendant's decisionmaking process and had a determinative influence on the outcome." Rea, 29 F.3d at 1455 (citation omitted).

In a RIF case, the Tenth Circuit has recognized three approaches to demonstrate pretext: (1) Plaintiff may offer evidence that his lay-off is inconsistent with RIF criteria; (2) Plaintiff may show that his evaluations were "deliberately falsified or manipulated"; or (3) Plaintiff may show that "the RIF is more generally pretextual." Beaird, 145 F.3d at 1168.

Although Plaintiff has not specified which approach he is using, it appears to the court that he is trying to establish that his lay-off was inconsistent with RIF criteria and that the RIF was more generally pretextual. Plaintiff claims that the following evidence, in its aggregate, meets his burden:

1. Through the time of his departure from the company in March of 2001, Highley never heard Jim Timble say anything to him about eliminating the positions of product specialists and never heard Timble say anything about eliminating Dennis Bost's position.

2. Sullivan testified that the elimination of Dennis Bost's position was not specifically discussed in executive meetings that took place in the Spring of 2001.

3. Sullivan testified that between January 1, 2001 and July 23, 2001, Dennis Bost was putting forth satisfactory effort to attempt to increase sales of hose and rubber products for the company.

4. Highley does not recall any job cuts in Profit Center III before March of 2001.

5. Through his last day of working for Defendant, Highley did not see any business reason for eliminating the position of Dennis Bost as product specialist.

6. Timble admitted that between 1997 and 2001, sales of hose and rubber products within Profit Center III exceeded the sales in the other individual Profit Centers.

7. Timble admitted that profits from sales of hose and rubber products were higher than profits from sales of other product[s] within Profit Center III for years 1999, 2000 and 2001.

8. Timble admitted that for years 1997 through 2001, profits from sales of hose and rubber products within Profit Center III were higher than the profits from hose and rubber product sales in any other profit centers.

9. On June 13, 2001, Sullivan was suggesting that Dennis Bost get involved in training members of the sales force to focus on hydraulic hose sales; Timble authorized the expenditure of $6000-$8000 toward a "pilot program"; Sullivan understood this to be a long-term project.

10. Highley told Lynn Bost that Dennis Bost was "the only person in this company that is making any money" and that he was "our most valuable employee."

11. Sullivan admits that before July 11, 2002, he had not made a decision to terminate[] Dennis Bost.

12. Dennis Bost later learned that the other rubber products specialists (Mike Ferguson and Phil Youst) did not get laid off in late July or early August of

2001.

13. On August 8, 2001, Timble wrote a memo marked "HIGHLY CONFIDENTIAL" to "ALL HEADCO MANAGEMENT PERSONNEL"; in the August 8, 2001 memo, Timble stated: "Our 'Product Specialist Program' will remain in force, but specialists (like managers) will receive a temporary 5% pay reduction."

The court assumes that Plaintiff is trying to show that his lay-off was inconsistent with RIF criteria by presenting evidence that he was a good, or even exceptional, employee who produced large profits for the company (see paragraph numbers 3, 5-8, and 10 above). Defendant admits that Plaintiff was a good employee, but justifies its decision by the cost of retaining Plaintiff. Specifically, Defendant points to the fact that Plaintiff was the second-highest paid employee in Profit Center III and had a company car and expense account. Whether Defendant's decision was justified by cost, however, is an issue for the trier of fact.

Defendant also points out that Plaintiff has adduced only one piece of evidence involving age. In paragraph 12, Plaintiff suggests that Mr. Ferguson and Mr. Youst did not lose their jobs because they were younger than Plaintiff. To justify the comparison of the treatment of other employees, a plaintiff must show that they were "similarly situated" employees. Aramburu, 112 F.3d at 1404. "Similarly situated employees are those who deal with the same supervisor and are subject to the same standards governing performance evaluation and discipline." Id. (citations and internal quotation marks omitted). As noted above, Mr. Ferguson and Mr. Youst worked in different Profit Centers under different decisionmakers. Under normal circumstances, this fact might indicate that Plaintiff, Mr. Ferguson, and Mr. Youst were not "similarly situated." Here, while there is evidence indicating that the Profit Center Group Vice-Presidents made employment

decisions, there is also evidence suggesting a high level of involvement in all decisions by Mr. Timble. The court is unwilling to rule as a matter of law that Plaintiff, Mr. Ferguson, and Mr. Youst were not "similarly situated" for purposes of comparing their treatment. Furthermore, the court notes that Plaintiff's case does not rest on this piece of evidence. He has presented substantial other evidence creating a genuine issue of material fact as to whether Defendant's legitimate explanation for Plaintiff's lay-off was pretextual.

Plaintiff has presented other evidence that focuses on Mr. Highley's view of the necessity of eliminating Plaintiff's position (paragraphs 1, 4, and 5 above) and the fact that the product specialist program was not eliminated overall, although Plaintiff's position was eliminated (paragraph 13). While perhaps not individually conclusive, the cumulative effect of this evidence is to create a genuine issue of material fact as to whether Defendant's facially legitimate explanation for Plaintiff's lay-off was pretextual.

In sum, the court concludes that Plaintiff has met his burden of establishing a prima facie case and presenting sufficient evidence of pretext to survive summary judgment. The court therefore denies summary judgment on Plaintiff's age discrimination claim.

IT IS, THEREFORE, BY THE COURT ORDERED that Defendant's motion for summary judgment (Doc. 39) is granted with respect to Plaintiff's ADA claim, and denied with respect to Plaintiff's ADEA claim.

Copies or notice of this order shall be transmitted to counsel of record.

IT IS SO ORDERED.

Dated at Kansas City, Kansas, August 4, 2003.

/s/ G. T. VanBebber
G. Thomas VanBebber
United States Senior District Judge